



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

May 4, 2017

The Honorable Christopher P. Stolle, M.D.
Member, Virginia House of Delegates
Post Office Box 5429
Virginia Beach, Virginia 23471

Dear Delegate Stolle:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether a locality has authority to enact an ordinance mandating the retrofitting of commercial facilities with manual entry door hardware, where the facilities were constructed prior to the effective dates of the Americans with Disabilities Act (the “ADA”) and the Architectural Barriers Act (the “ABA”).

Applicable Law and Discussion

The ADA is a federal civil rights law that prohibits discrimination upon the basis of physical or mental disability.¹ It generally does not apply retroactively; only commercial facilities designed and constructed for first occupancy after January 26, 1993 are subject to ADA standards.² Nevertheless, it does provide that existing facilities³ “shall remove architectural barriers”⁴ for disabled persons when such

¹ See generally 42 U.S.C.S. §§ 12101 through 12213 (LexisNexis through Pub. L. No. 115-29); 28 C.F.R. §§ 36.101 through 36.607 (2017).

² 42 U.S.C.S. § 12183(a)(1); C.F.R. § 36.401(a)(1) (“[D]iscrimination for purposes of this part includes a failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities.”). See also 28 C.F.R. § 36.401(a)(2) (clarifying when a building is deemed “designed and constructed for first occupancy”).

³ 28 C.F.R. § 36.104(3)(iii) (2017) (defining the term “existing facility” to mean “a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.”).

⁴ 28 C.F.R. § 36.304(a) (2017). See also 42 U.S.C.S. § 12182(b)(2)(A)(iv).

changes would be “readily achievable.”⁵ It lists examples of changes deemed “readily achievable,” one of which includes “[i]nstalling accessible door hardware.”⁶ Thus, it provides for limited retroactive application by requiring the retrofitting of manual entry door hardware for commercial facilities constructed prior to the effective date of the Act. It is enforceable by individual lawsuits or the United States Attorney General.⁷

Another federal law, the ABA,⁸ serves “to insure whenever possible that physically handicapped persons will have ready access to, and use of, [buildings].”⁹ It generally covers federal buildings and facilities—specifically, those constructed, leased, or financed by the United States Government, when such buildings are intended to be “accessible to the public, or may result in the employment or residence therein of physically handicapped persons”¹⁰ It is enforceable through regulations that may be issued by certain federal agencies and enforced by another federal agency.¹¹ Federal facilities are exempt from local building requirements.¹²

Neither of these federal laws expressly grants enforcement authority to localities.

Against this background, you have asked whether a Virginia locality has the authority to enact an ordinance requiring the retrofitting of door hardware on commercial facilities constructed prior to the effective date of the ADA or the ABA. Virginia follows the Dillon Rule of strict construction, which

⁵ 28 C.F.R. § 36.304(a) (defining “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense”).

⁶ 28 C.F.R. § 36.304(b)(11).

⁷ An individual may file suit under the ADA to compel renovation of a commercial facility that is not “readily accessible to and usable by individuals with disabilities.” See 42 U.S.C. § 12183 (providing that commercial facilities are subject to ADA standards); 42 U.S.C. § 12181 (defining the term “commercial facilities” to mean facilities “that are intended for nonresidential use . . . and . . . whose operations will affect commerce.”); and 42 U.S.C.S. § 12188(a)(1) (“[A]ny person who is being subjected to discrimination on the basis of disability in violation of [the ADA]” may bring a civil action to seek remedies under the Act.); 42 U.S.C.S. § 12188(a)(2) (Injunctive relief is available and “shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by [the ADA].”). See also 28 C.F.R. § 36.501. Enforcement power under the ADA also lies with the United States Attorney General. See 42 U.S.C. § 12188(b); 28 C.F.R. §§ 36.502, 36.503.

⁸ See generally 42 U.S.C. §§ 4151 through 4156 (LexisNexis through Pub. L. No. 115-29).

⁹ 42 U.S.C.S. § 4152.

¹⁰ 42 U.S.C.S. § 4151. The ABA may also apply to non-federal buildings, but only when such buildings are built or altered with grants or loans provided by a federal agency that retains the ability to establish facility standards. *Id.* § 4151(3). See also *About the ABA Standards*, UNITED STATES ACCESS BOARD, available at <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-aba-standards> (last visited May 3, 2017).

¹¹ See 42 U.S.C.S. §§ 4152 to 4154a (authorizing the promulgation of standards for design, construction, and alteration of buildings). See also 29 U.S.C.S. § 792 (LexisNexis through Pub. L. No. 115-29) (establishing the Access Board in order to “ensure compliance with the standards prescribed pursuant to the [ABA]” The United States Access Board receives complaints and investigates potential violations of the ABA. *Architectural Barriers Act (ABA) of 1968*, UNITED STATES ACCESS BOARD, available at <https://www.access-board.gov/the-board/laws/architectural-barriers-act-aba> (last visited May 3, 2017).

¹² See *Arizona v. California*, 283 U.S. 423, 451 (1931) (“The United States may perform its functions without conforming to the police regulations of a State.”); see also *United States v. City of Chester*, 144 F.2d 415, 421 (3rd Cir. 1944) (recognizing federal “immunity from local building restrictions or ordinances . . .”).

“provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”¹³ A corollary to the Dillon Rule provides that “the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.”¹⁴ Therefore, whether a locality may enact the ordinance described in your request depends upon delegation of the requisite authority by the General Assembly.

Here, the General Assembly has not delegated such authority. In Virginia, the construction and retrofitting of buildings are governed by the Uniform Statewide Building Code (the “USBC”) and the Statewide Fire Prevention Code (the “SFPC”).¹⁵ The *Code of Virginia* provides that the USBC and the SFPC shall supersede the regulation of building construction and retrofitting by localities.¹⁶ “In keeping with the precepts of the Dillon Rule, where the General Assembly expressly limits the power of a locality, rather than enabling it, the express limitation must be given effect.”¹⁷ Thus, a locality may not enact the type of ordinance about which you inquire.

Conclusion

For the reasons set forth above, and in response to your inquiry about local authority to enact ordinances on this subject, it is my opinion that under current law a locality lacks authority to enact an ordinance requiring the retrofitting of commercial facilities with manual entry door hardware, where the facilities were constructed prior to the effective date of the ADA. It is my further opinion that under current law a locality lacks authority to enact an ordinance mandating the retrofitting of federal commercial facilities constructed prior to the effective date of the ABA.

With kindest regards, I am

¹³ *Richmond v. Confre Club of Richmond, Inc.*, 239 Va. 77, 79 (1990) (citations omitted).

¹⁴ *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117 (1975) (citations omitted). *See also* *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 554 (2008) (citations omitted) (The corollary to the Dillon Rule applies “the rule to other public bodies such as boards of supervisors . . . in addition to municipal corporations.”).

¹⁵ 13 VA. ADMIN. CODE § 5-63-20(A). The purpose of the USBC is to “protect the health, safety and welfare of the residents of the Commonwealth of Virginia,” in part through “barrier-free provisions for the physically handicapped . . .” *See also* VA. CODE ANN. § 36-99 (2014).

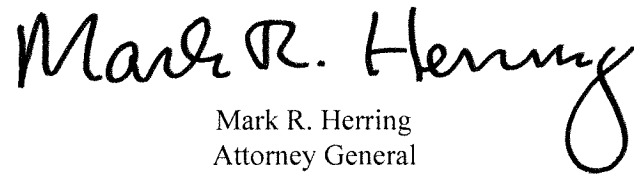
¹⁶ VA. CODE ANN. § 36-98 (2014) (The USBC “shall supersede the building codes and regulations of the counties, municipalities and other political subdivisions”); *see also* 13 VA. ADMIN. CODE § 5-63-20(B). VA. CODE ANN. § 27-97 (2016) (“The Fire Prevention Code shall supersede fire prevention regulations heretofore adopted by local governments or other political subdivisions.”); *see also* 13 VA. ADMIN. CODE § 5-51-21. Section 27-97 does reserve for localities the narrow authority to “adopt fire prevention regulations that are more restrictive or more extensive in scope than the [SFPC] provided such regulations do not affect the manner of construction, or materials to be used in the erection, alteration, repair, or use of a building or structure” However, this meager exception—permitting only fire prevention regulations that do not affect construction or materials—does not enable a locality to require the retrofitting of commercial building entryways with manual entry door hardware.

¹⁷ 2015 Op. Va. Att’y Gen. 144, 147 (citing *Lamar Co., LLC v. City of Richmond*, 287 Va. 348, 352 (2014) (“[R]estrictive legislation limits the power of local governments.”)).

Honorable Christopher P. Stolle, M.D.
May 4, 2017
Page 4

Very truly yours,

.

A handwritten signature in black ink that reads "Mark R. Herring". The signature is fluid and cursive, with a large loop at the end of the word "Herring".

Mark R. Herring
Attorney General